

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of M. R. J. BURT, Minor.

UNPUBLISHED

May 20, 2014

No. 318282

Eaton Circuit Court

Family Division

LC No. 10-017763-NA

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Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

Respondent father appeals as of right the order terminating his parental rights to the minor child under MCL 712A.19b(3)(g) (failure to provide proper care or custody) and MCL 712A.19b(3)(h) (parent imprisoned and child will be deprived of home for two years). We affirm.

In 2005, respondent pleaded guilty of three counts of operating/maintaining a laboratory for the production of a controlled substance, MCL 333.7401c(2)(a), and possession of methamphetamine, MCL 333.7403(2)(b)(i). He was sentenced on August 10, 2005, to maximum prison terms of four years for the three convictions of operating/maintain a laboratory, and two years for the possession conviction. Respondent was discharged on August 23, 2007. The child was born in May 2009. In August 2010, respondent and the child's mother were arrested for producing and possessing methamphetamine in their home. The trial court assumed jurisdiction over the child. The child's mother arranged for the child to be placed with respondent's aunt and uncle, the Johnsons.

On March 24, 2011, the child's mother admitted to most of the allegations in the petition, and respondent pleaded guilty of the charges against him. At a dispositional hearing held on April 22, 2011, respondent remained in jail awaiting sentencing. In August 2011 respondent was sentenced to a term of imprisonment, with his earliest release date in August 2014 and his latest release date in August 2030.<sup>1</sup>

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<sup>1</sup> Respondent pleaded guilty of operating/maintain a laboratory for the production of a controlled substance, MCL 333.7401c(2)(f), and possession of methamphetamine, MCL 333.7403(2)(b)(i), and he was sentenced as an habitual offender, fourth offense, MCL 769.12.

This case was held open for nearly three years because it appeared that the child's mother was making progress toward reunification.<sup>2</sup> The service plan identified respondent's needs as substance abuse counseling, psychiatric evaluation, refraining from criminal activity, parenting skills, source of income, and housing.

In April 2013, the child was returned to her mother, but she was removed shortly thereafter once it became apparent that reunification with the mother was not appropriate. A supplemental petition to terminate both parties' parental rights was filed in July 2013. At the termination hearing, it was clear that the child had bonded with respondent's aunt and uncle, and even though she participated in phone calls with respondent, she was either unaware that he was her father or had emotional difficulty acknowledging it. Respondent testified that he participated in AA in prison, but that he had not yet been accepted into substance abuse treatment. He also testified that he was "released off" of psychiatric counseling after he was taken off of Prozac. Parenting classes were not offered at the prison where he was incarcerated. Respondent testified that he contacted petitioner several times requesting that he be transferred to a prison where he could take parenting classes, to no avail. Respondent requested that his aunt and uncle be appointed guardians of the child. The aunt testified that she was opposed to a guardianship and preferred to adopt the child.

After hearings were held, the trial court found that each statutory ground for termination alleged had been established by clear and convincing evidence and that termination was in the child's best interests. Respondent argues that the trial court erred in finding that the statutory grounds were established and that termination was in the best interests of the child.

A trial court may terminate a respondent's parental rights if one or more of the statutory grounds for termination listed in MCL 712A.19b(3) have been proven by clear and convincing evidence. Once a statutory ground for termination has been proven, the trial court must find that the termination is in the child's best interests before it can terminate parental rights. MCL 712A.19b(5); MCR 3.977(E)(4). We review for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest under MCL 712A.19b(5). *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). A trial court's decision is clearly erroneous "[if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id.* (citations omitted).

The trial court found that termination of respondent's parental rights was appropriate under MCL 712A.19b(3)(g) and (h), which provides:

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

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<sup>2</sup> Her parental rights were eventually terminated. She is not a party to this appeal.

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

Here, the trial court opined in part:

No question [respondent] has been in prison and jail combined now for about three years and again he'll be there at least one more year and again there's no guarantee that he'll be released in a year but that could happen. The reality is that because of his incarceration for the last three years and at least one more is that he has not been able to provide care and custody for this child.

And because of the fact, again through no fault of [respondent], but because of the fact that even if he were released today he would not be able – in a position to reunify with his daughter because we certainly still have a long list of things to work on with the parenting skills, long term substance abuse issues, mental health issues, housing issues, there still would be a long period of time to be in a position where anyone could recommend the return of [the child] to him.

And this Court finds that because of that and the uncertainty of a release date the Court finds that based on the age of [the child] that there is not a reasonable expectation that the parent would be able to provide proper care and custody within a reasonable time considering this particular child's very young age in this case.

With regard to MCL 712A.19b(3)(g), the court found that respondent was not able to provide proper care and custody and had not been able to do so for most of the child's life due to his legal troubles. The court noted that the child had been in the care and custody of others for the majority of her life, and also noted the uncertainty of respondent's release date from prison. The court noted that an earliest release date in August 2014 would mean that reunification would be more than two years away to allot time for respondent to address his long-term substance abuse issues, mental health issues, parenting skills, housing, and employment issues.<sup>3</sup> If respondent serves his entire sentence, he will not be released until August 2030. The trial court properly concluded that the child had waited long enough for a permanent and safe home. The trial court's determination that clear and convincing evidence was presented to support termination of respondent's parental rights under MCL 712A.19b(3)(g) was not clearly erroneous. Because only one statutory ground for termination need be established, we need not

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<sup>3</sup> We note that respondent testified that some services were not available to him at the prison where he was incarcerated. However, there is no indication in the record that respondent, who participated in the proceedings, challenged the service plan when the court initially adopted it, or that he informed the court of his inability to receive treatment while incarcerated.

consider whether the trial court properly terminated respondent's parental rights under MCL 712A.19b(3)(h). *In re CR*, 250 Mich App 185, 207; 646 NW2d 506 (2002).

Respondent also argues that the trial court clearly erred by finding that the evidence established that termination of respondent's parental rights was in the child's best interest. "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). "[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence." *In re Moss Minors*, 301 Mich App 76, 90; 836 NW2d 182 (2013). "In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts Minors*, 297 Mich App 35, 41–42; 823 NW2d 144 (2012) (citations omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, — Mich.App —; — NW2d — (Docket No. 316749, issued January 16, 2014), slip op p 6. The trial court may also consider an unfavorable psychological evaluation and the child's age. See *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009). In addition, because "'a child's placement with relatives weighs against termination under MCL 712A.19a(6)(a),'", the fact that a child is living with relatives when the case proceeds to termination is a factor to be considered in determining whether termination is in the child's best interests." *In re Olive/Metts Minors*, 297 Mich App at 43, quoting *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010).

The trial court gave the following reasons for its determination that termination was in the child's best interests:

I now have to look at the second phase and that is to determine finding that there is statutory grounds for termination is it also in [the child's] best interest for termination because if it's not then I cannot terminate. And the courts have set forth certain things that this Court must look at to determine the best interests of [the child] in this case.

The first factor that I must look at is the child's bond to the parent. As to that particular issue I also can look at the love, affection and other emotional ties between the parent and the child and in this case I find that it's very clear that [respondent] has a strong love for his child [] and again I greatly appreciate that. He, again, clearly loves his child and he has affection for her. He has unfortunately been prevented from getting emotional ties to her because of the separation due to his incarceration. And as far as the bonding is concerned again the testimony regarding the phone calls I think sums it up best and I don't think [respondent] denies this, that this child because of her age and because of the fact that she has not been able to see her father has not developed a proper father-daughter bond again because of separation. Some phone calls and short discussions on the phone although that's all we have right now just cannot establish a bond between the child and the parent.

So based on that factor I find that there is a preponderance of the evidence that the child is not properly, at least at this point, bonded with [respondent] or actually with [the child's mother] as well because she has chosen to stay out of [the child's] life. There just does not appear to be any—any strong bond whatsoever between the child and her natural parents.

The second factor I must look at is the parent's parenting ability. . . .

As to [respondent], um, I think he has the capacity for the love, affection and emotional ties but he's been unable because of his incarceration to show that love, affection and emotional ties or to provide food, clothing or medical care again because of his lack of income other than a small amount and the fact that he has to pay restitution in this case. So he has lacked the actual ability to provide food, clothing and medical care. And certainly his moral fitness is a factor in this case, um, again committing another felony after being on probation for a felony before and doing his time, getting back in the world and committing another crime. Again I would love to hope that there would be no more crime and I—I hope you turn yourself around, sir, but again the past conduct shows that the parenting ability of [respondent] as well does not rise to the level of reunification. Therefore that would—that would favor termination.

The next factor is the child's need for permanency, stability and finality. And this is a very tough issue in this case for [the child] because [the child] since, you know, she was around 15 months old has been with other people. She according to the testimony clearly views her aunt and uncle, Mr. and Mrs. Johnson, as her parents. That's where her stability is; that's what's important to her this Court finds. She certainly has some issues that she's working with a counselor to address even at her very young age. But it's clear to this Court that stability for her is paramount. That's what she needs—that's what she needs to thrive. And when I look at the best interests of [the child], not the best interests of the parents but best interests of [the child] to me the issue of stability and permanency and finality is—is the most important element that I need to examine in this case. And I look at the time that she's lived in a stable, satisfactory environment and I find that the time with the Johnsons has provided her the stable, satisfactory environment and again I think [respondent] would love to provide that environment but he's not been able to do so and the child's certainly not old enough I think to express a preference onto that but to me the evidence is clear based on the information we had at both the adjudication phase and today's phase that Mackenzie needs permanency. She needs stability. And she needs finality.

And, um, and even if we—if I adopt [respondent]'s suggestion and I—I give that very serious discussion because again in a perfect world, sir, if you are out in a year and if you had services provided to you and if you were able to show that you were a ready, willing and able parent to [the child], um, she doesn't know you. And so it's going to take a long time to establish that bond between a father and a daughter. And she has already been in foster care for three years.

So based on all those factors together although guardianship is seriously considered by this Court I find that that is not at this point in [the child's] best interest because she needs that permanency, stability and finality.

So therefore those factors to me, based on all the evidence weighs in the factor—on the side of termination as well.

The next factor I also look at is the advantages of foster home over the parent's home. And in this case a relative placement such as this favors reunification as a matter of law for exactly the reasons talked about today and that is when [respondent] gets released from prison and gets himself back on track the fact that [the child] is with relatives that would favor a guardianship/reunification in the future and so that factor does favor reunification.<sup>4</sup>

And therefore I have to weigh all these factors together, the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability and finality and the advantages of the foster home over the parent's home. Weighing all those factors, again, some are in favor of reunification with [respondent] and some are not and favor termination. I do find that based on all those factors together there's a preponderance of the evidence in this case that it is in [the child's] best interest that this Court order termination of parental rights to both parents. Again, the child has been in foster care for a long time. Her foster parents, her aunt and uncle, are the parents that she knows. And I have to put her best interests in front of everybody else's in this case and doing that I think the evidence is clear and substantial that it is in her best interest to have the rights of both of her parents terminated for the reasons that I've set forth.

The court added:

With that being said, then, [respondent] I also will let you know that again although I'm going to issue an order today terminating your parental rights that does not mean that I'm ordering you out of her life. The—if she is adopted by the Johnsons—and I think from what you're saying that you feel that that's a very appropriate place—they certainly have the full authority and discretion to allow you to be a part of her life and I think Mrs. Johnson testified today that they're very willing to do that. And so you are a nephew that they have and that they love and I have full faith that they will allow you as appropriate into her life in the future. So this is not an order in any way saying that you can never be a part of her life. But I have to put [the child's] best interests ahead of everybody else's in this case and I think for her benefit and I think if you think about it I think you'll—you'll—I'm hoping that you will agree that permanency and stability is really important to her and we want to make her thrive, we want to make her have

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<sup>4</sup> We note, however that the relative caregivers expressed no interest in pursuing a juvenile guardianship; rather, they were willing to adopt the child.

a good life and because of that I feel that the evidence is compelling that I issue an order terminating the rights of both parents and allowing [the child] to be available for adoption.

On this record, we find that the trial court did not clearly err in determining that termination of respondent's parental rights was in the child's best interest. It is undisputed that respondent did not have a bond with the child due to his incarceration. Although he was permitted to call her, it is clear that she was either not aware that he was her biological father or had emotional difficulty acknowledging it. Furthermore, following her brief return to her mother, the child suffered anxiety over the prospect of being taken away from the Johnsons, which demonstrated her need for permanency, stability, and finality. Further, although placement with relatives may weigh against finding that termination is in a child's best interests, it is clear that the trial court explicitly considered the fact that the child was in the care of relatives at the time of the termination hearing, as well as the fact that the relatives were interested in adoption and not a guardianship, in determining that termination was in the best interests of the child.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Henry William Saad